

2000

Jim Nebeker dba Nebeker Trucking v. Utah State Tax Commission : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JIM NEBEKER, dba JIM NEBEKER)	
TRUCKING,)	Appeal No: 20000834-SC
)	(Consolidated with Appeal
Plaintiff/Appellant,)	No. 990835-SC)
)	
vs.)	
)	
UTAH STATE TAX COMMISSION,)	
)	Priority No. 15
Defendant/Appellee.)	

BRIEF OF APPELLEE

APPEAL FROM AN ORDER OF THE UTAH STATE TAX
COMMISSION DATED AUGUST 31, 2000

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THE COURT

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction to review the decision of the Utah State Tax Commission pursuant to Utah Code Ann. §§ 59-1-602(1)(a)(2000) and 63-46b-16(1)(1997).

ISSUES PRESENTED/STANDARD OF REVIEW

1. Does the doctrine of *res judicata* prevent Nebeker from raising issues in this proceeding which it failed to raise in a prior proceeding involving the same parties and same facts? (R.-40.) Pursuant to Utah Code Ann. §59-1-610 the Court is to grant the Commission deference concerning the written findings of facts supporting its decision and apply a correction of error standard to its application of law.

2. Does the doctrine of judicial estoppel have any application to the facts presented? (R.-37.) Pursuant to Utah Code Ann. §59-1-610 the Court should grant deference to the findings of facts supporting the Commission's decision and apply a correction of error standard to its application of law.

STATEMENT OF THE CASE

Nebeker appeals the dismissal of its Petition seeking a partial refund of interest paid on special fuel taxes deemed due following its appeal of an audit assessment.

STATEMENT OF FACTS

Jim Nebeker Trucking is a common carrier headquartered in Roosevelt, Utah. (R.-89.) Nebeker's fleet of tanker trucks is

licensed under the International Fuel Tax Agreement ("IFTA")
(R.-89.)

By statutory notice dated November 20, 1995, Nebeker was assessed a deficiency of \$29,988.03, plus interest. (R.-89.) Nebeker filed a Petition asserting some of its travel was not on the "public highways" of the State and was therefore not taxable. (R.-90.)

On January 20, 1998, a formal hearing was held before the Tax Commission. (R.-88.) On May 12, 1998, the Commission issued a formal decision. (R.-88-102.) The Order granted partial relief to Nebeker, and the parties attempted to reconstruct Nebeker's off-highway mileage in accordance with the Order. (R.-100.)

A second statutory notice was sent on or about September 30, 1999. (R.-128.) After receiving additional information from Nebeker, a third statutory notice was sent on or about March 30, 1999. (R.-129.)

Nebeker did not file a Petition for Redetermination of this notice. The statutory notice became a final assessment pursuant to Utah Code Ann. §59-1-503 (2000) thirty days from the date the notice was sent, which would be on or about April 29, 1999. (R.-128.) Nebeker tendered partial payment of the assessment on May 14, 1999. (R.-172.)

On June 9, 1999, Nebeker filed an original action in the 8th

District Court, Case No. 990000127CR¹. Nebeker tendered the remaining amount due July 14, 1999. (R.-175.) On July 15, 1999, the Tax Commission moved to dismiss the District Court Complaint for lack of jurisdiction. (R.-46.) On August 26, 1999, Judge Lyle Anderson of the 8th District Court, granted the Motion. (R.-84.) On September 23, 1999, Nebeker appealed the District Court's dismissal².

On or about September 15, 1999, just prior to appealing the District Court decision, Nebeker applied to the Tax Commission pursuant to Utah Code Ann. §59-13-318(1996) for a refund of a portion of the interest paid. (R.-151-52.) The claim for refund was denied by the Auditing Division by statutory notice dated October 27, 1999. (R.-135-36.) On November 4, 1999, Nebeker filed a Petition for Redetermination to have the Tax Commission reconsider the Auditing Division decision. (R.-125-26.)

On December 14, 1999, the Auditing Division filed a Motion to Dismiss the Petition asserting *res judicata* as a defense. (R.-74,-108.) The matter was fully briefed and a hearing held March 23, 2000. (R.-32,-37,-55.) On August 31, 2000, the Commission

¹ The pleadings from the district court case are part of the record in Appeal No. 990835-SC which has been consolidated with this case. The pleadings are attached as exhibits to Appellee's Brief in Appeal No. 990835-SC.

² Appeal of the District Court action has progressed as Supreme Court Appeal No. 990835-SC.

issued its decision and Order. (R.-10.)

Nebeker filed its Petition for Review on September 28, 2000. (R.-1.) On November 9, 2000, the appeal was dismissed by Order of the Supreme Court for failure to file a docketing statement. On November 17, 2000, Nebeker filed its docketing statement and the appeal was reinstated pursuant to the Court's prior Order.

On November 22, 2000, the Commission filed a Suggestion of Mootness regarding appeal no. 990835-SC. Following oral argument, the Court issued an Order dated January 18, 2000, consolidating this appeal of the Tax Commission's dismissal based on *res judicata*, appeal no. 20000834, with the appeal of the District Court's dismissal based on lack of jurisdiction, appeal no. 990835-SC.

SUMMARY OF ARGUMENT

The doctrine of *res judicata* has long been applied to agency decisions in Utah. Where an issue is raised, or could of have been raised, in a prior proceeding involving the same parties, which resulted in a final determination, the doctrine prevents a party from re-litigating those claims or issues in a subsequent proceeding involving the same parties. Nebeker was therefore required to raise all issues it had with its audit assessment in the prior proceeding challenging that assessment. Nebeker is therefore barred from raising issues which could and should have been raised in that proceeding in a subsequent proceeding

involving the same parties. Therefore, the Commission properly applied the doctrine of *res judicata* in barring this action.

The Tax Commission has both constitutional and statutory authority over appeals challenging audit assessments. It therefore had subject matter jurisdiction over the prior proceeding. Nebeker's issue regarding the interest calculation was an issue which was present and required to be presented to the Commission in prior proceeding. The fact that Nebeker challenges the constitutional basis of the interest rate used does not excuse Nebeker from the obligation to raise the issue before the Commission. The issue is one that could have been mooted or avoided by the Commission in the manner in which they ruled upon the case. The Commission could have granted relief on other grounds not involving the constitutional question.

The requirement in this State, as well as many other well-reasoned decisions from across the country, is that a party must raise all issues it has with an administrative agency through its appeal before the agency. This is true even if the issue calls into question the constitutionality of statutes or rules which are beyond the agency's authority to revoke. This requirement is supported by sound public policy and will promote judicial economy and efficiency in the administration of justice.

The doctrine of judicial estoppel does not apply. The Tax Commission has not changed the legal position taken in these

proceedings from the legal position taken in the District Court action. Therefore, the Tax Commission acted properly in dismissing Nebeker's appeal and its Order of Dismissal should be affirmed.

ARGUMENT

I. The Commission Properly Applied *Res Judicata*.

The doctrine of *res judicata* deals with the preclusive effects given to judgments; it prevents parties from re-litigating the claims that have, or could have been litigated on the merits and have resulted in a final decision. Salt Lake City v. Silverfork Pipeline Co., 913 P.2d 731, 733 (Utah 1995). In applying *res judicata* or claim preclusion, three criteria must be met. First, both cases must involve the same parties or their privies or assigns. Second, the claim sought to be barred either must have been presented or have been available to be presented in the first case; and third, the first suit must have resulted in a final judgment on the merits. In re: Rights to Use Water v. Springville 982 P.2d 65 (Utah 1999); citing Fitzgerald v. Corbit, 793 P.2d 356, 359 (Utah 1990).

The doctrine is premised on the principle that a controversy should only be adjudicated once. Although initially developed with respect to the judgments of courts, the same basic policies, including the need for finality in administrative decisions, support the application of the doctrine of *res judicata* to administrative agency determinations.

Salt Lake Citizens Congress v. Mountain States Telephone &

Telegraph Co., 846 P.2d 1245, 1250 (Utah 1992). "The doctrine of *res judicata* has been applied to administrative decisions in Utah since at least 1950." Id.

In this case, all three requirements are satisfied. First, both this case and the prior Tax Commission appeal, no.95-1597, involve the same parties; Jim Nebeker dba Nebeker Trucking as the Petitioner, and the Auditing Division of the State Tax Commission as the Respondent. This point is not in dispute.

Second, the claim was available to have been presented in the first matter. In the prior matter the Tax Commission had issued a deficiency against Petitioner. That deficiency clearly calculated interest due at the rate of 12%. It is a well-established rule that issues not raised before an administrative body are waived on appeal. Whitcar v. Labor Comm'n, 973 P.2d 982, 985 (Utah App. 1998); Gibson v. Board of Review of Indus. Comm'n, 707 P.2d 675, 677 (Utah 1985); Pease v. Indus. Comm'n, 694 P.2d 613, 616 (Utah 1984); Ashcroft v. Indus. Comm'n, 855 P.2d 267, 268-69 (Utah App. 1993). The policy for this rule is the promotion of judicial efficiency. By raising an issue at the formal hearing, the Commission could have adjudicated the issue concurrent with its deliberations on the other issues raised. Matters should not be litigated piecemeal, one issue at a time.

The convoluted nature of the proceedings bringing the parties before the Court in these consolidated appeals are ample

evidence of the wisdom in requiring all issues to be raised in a single proceeding. Had Nebeker preserved the issue in appeal no. 95-1597, it could have presented it directly to the Supreme Court on appeal of that decision. The Court would have the matter presented in context and, as the ultimate authority on state constitutional questions, could have issued a ruling in a timely and efficient manner.

The fact that the issue was constitutional in nature however, does not excuse Nebeker from the requirement to raise the issue before the commission. In State Tax Comm'n v. Iverson, 782 P.2d 519 (Utah 1989), the Court held that even though the Commission could not decide questions of legality and constitutionality, petitioners still had to follow the exclusive method of seeking redress through the Commission before appealing to a court capable of deciding those questions. Id. at 525. Likewise in Johnson v. Utah State Retirement Office, 621 P.2d 1234, 1237, (Utah 1980); the Court found:

Plaintiffs' assertion of a constitutional issue does not alter the necessity for compliance with the requirement of first adjudicating their claim before the retirement board. Administrative agencies do not generally determine the constitutionality of their organic legislation. (Citations omitted.) But the mere introduction of a constitutional issue does not obviate the need for exhaustion of administrative remedies. As stated in Public Utilities, 355 U.S. at 539-40, 'if... an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued.'

The third requirement is also met. The prior hearing

resulted in a Final Decision of the Commission (R.88-101). Petitioner was required to raise all issues it had with the assessment at the formal hearing that was held in its appeal of the audit assessment, no. 95-1597. It failed to raise the issue. Therefore, Petitioner is precluded by the doctrine of *res judicata* from raising in a separate proceeding issues which could and should have been raised when it had its full day in court. The doctrine of *res judicata* "reflects the expectations that parties who are given the capacity to present their entire controversies shall in fact do so." Ringwood v. Foreign Auto Works, 786 P.2d 1350, 1357 (Utah App. 1990); (quoting Restatement 2d Judgments §24(1982)).

II. The Tax Commission Had Subject Matter Jurisdiction Over Appeal No. 95-1597.

The thrust of Nebeker's argument is that the Tax Commission lacked subject matter jurisdiction in appeal 95-1597 to hear the interest issue; therefore, *res judicata* should not bar it from raising the interest issue directly in a subsequent appeal to the Commission. This argument must fail since the Commission had subject matter jurisdiction.

The cases cited by Nebeker indicate that "typically agencies have limited subject matter jurisdiction." SMP v. Kirkman, 843 P.2d 531, 533 (Utah App. 1992). While this statement may be true generally, the Tax Commission had both constitutional and direct statutory basis for subject matter jurisdiction. Appeal 95-1597

was an appeal of an audit assessment. The Utah Constitution, Article XIII, Section 11(3) grants the Commission both the duty and authority to "administer and supervise the tax laws of the state." This constitutional authority is reflected in the statutory language of Utah Code Ann. §59-1-210(2000) which also places the administration of the tax laws within the Commission's jurisdiction. Utah Code Ann. §59-1-501(2000) gives the Commission authority to hear appeals based upon a petition for redetermination of an audit deficiency. Utah Code Ann. §59-13-313(2000) gives the Commission specific authority for administration of Part 3 of Title 59, Section 13, special fuels. In addition to the authority granted under §59-1-210(25) to perform "any further duties imposed by law" and "exercise all powers necessary in the performance of its duties," the Commission is given specific authority in Utah Code Ann. §59-1-401(10)(2000) (section effective until July 2, 2001) to "waive, reduce, or compromise any of the penalties or interest imposed under this part."

Nebeker's Petition for Redetermination in Appeal No. 95-1597 falls squarely within the jurisdiction of the Commission as granted by both constitutional and statutory authority. Nebeker has not claimed that the Order rendered in case no. 95-1597 is void. Nor do they appear willing to renounce the partial relief the Commission provided them in that Order. Therefore, Nebeker's

claim that the Commission lacked subject matter jurisdiction in the prior appeal is without merit.

III. Nebeker Was Required to Raise its Constitutional Issues in the Prior Proceeding.

As argued above, the Commission had subject matter jurisdiction over the prior appeal. Appeal of agency decisions is statutory and requires compliance with the statutorily mandated procedures. See, Union Pacific R.R. Co. v. Utah State Tax Comm'n, 999 p.2d 17 ¶ 23 (Utah 2000). Utah Code Ann. §59-1-601 provides for review of final agency actions by the District Court or the Supreme Court. District Court jurisdiction is limited by the Utah Constitution, Article XIII, Section 11, which allows the Legislature to provide for review of "matters decided by the Commission." It is well-settled that the Supreme Court will not review matters which were not raised before the administrative agency. Whitewar v. Labor Commission, 973 P.2d 982 (Utah App. 1988). Therefore, under Utah law, a party having an appeal before the Utah State Tax Commission is required to raise all issues it has with the assessment in order to preserve those issues for appeal.

This case is distinguishable from the authority cited by Nebeker. It does not involve a question of whether the agency had jurisdiction over the prior action. The Tax Commission clearly had subject matter jurisdiction over Appeal No. 95-1597. This case does not inquire whether Nebeker was required to first

initiate an action at the Commission before pursuing another remedy. In this case, Nebeker voluntarily filed a petition before the Utah State Tax Commission seeking appeal of its audit assessment. Extensive discovery was done. The parties briefed and argued several complex issues at the formal hearing. That hearing resulted in Nebeker receiving partial relief. If Nebeker had issues regarding the calculation of its tax deficiency, it was required to raise those issues in that proceeding in order to preserve those issues for appeal.

Where the constitutional issue may be resolved by "any twist or turn the case may have taken at the Commission" a party is required to give the Commission the opportunity to resolve it. See, Brumley v. State Tax Comm'n, 868 P.2d 796 (Utah 1993). If Nebeker had received complete, rather than partial relief, in appeal 95-1597, it is possible, if not likely, that no vestige of the constitutional issue would have remained. The Commission also has authority to waive or compromise interest, Utah Code Ann. §59-1-401(10), therefore the Commission could have granted the relief requested without ruling on the constitutionality of the statute. "If an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued." Public Utilities Commission of California v. United States, 355 U.S. 534 (1958); 3 Davis Admin. Treatise 20.04 (1958), as cited in Johnson v. State Retirement

Office, 621 P.2d 1234 (Utah 1980). The Court's final observation in Johnson applies with equal force to the fact situation presented here:

The instant case involves issues other than the constitutional claim, and pursuit of plaintiff's administrative remedies might obviate the need for addressing that issue. If not, judicial attention to the constitutional issue, as well as other issues, will be better framed by the structure of a factual context. (Citations omitted.) (Id. at 1237.)

Other jurisdictions have followed this reasoning and specifically required that constitutional challenges to taxes be brought before the administrative body charged with the administration of taxation. In Indiana v. Sproles, 672 N.E.2d 1353 (Ind. 1996), the Indiana Court cited the following reasons for requiring a party to bring a constitutional challenge before the Department of State Revenue even though that Department had no authority to strike down a tax statute. First, the legality of a tax could not be challenged until statutory remedies had been exhausted. Second, requiring exhaustion as a prerequisite in constitutionally based challenges to a tax, served to preserve order in the tax collection process; and third, it would give the Department an opportunity to revoke the assessment on non-constitutional grounds. Citing, Felix v. Indiana Dept. of State Revenue, 501 N.E.2d 119, 121-22 (Ind. App. 1986).

This holding was reiterated in a recent Indiana case: State Board of Tax Commissioners v. Montgomery, 730 N.E.2d 680 (Ind.

2000). In that case, the petitioners attempted to bypass the administrative agency and file an action directly in the tax court challenging the constitutionality of the "health care for indigent property tax program." The Indiana Supreme Court found that the tax court lacked jurisdiction because the petitioner had failed to exhaust its administrative remedies. Citing Sproles, the court found that the taxpayer could not circumvent administrative remedies and challenge the constitutionality of a tax directly in court, even if the administrative agency to which the taxpayer appeals is without the power to grant the exact remedy the taxpayer seeks. Id. at 684.

The State of Missouri has adopted a similar policy. In LaMay Building Corp. v. Director of Revenue, 889 S.W.2d 835, 837 (Mo. 1994), the court found that constitutional issues not raised at the first opportunity are deemed waived. Missouri has specifically held that when a party is challenging the application of a statute before an administrative agency on constitutional grounds, that party must raise the constitutional issue and preserve it for appeal before the agency. Duncan v. Missouri Board, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988). The purpose of this rule is to bring to the attention of the tribunal the constitutional objection and allow the tribunal to correct itself.

Moreover it is imperative to an efficient and fair administration of justice that a litigant may not

withhold his objections, await the outcome, and then complain that he was denied his rights if he does not approve the resulting decision. (Citations omitted.) Tate v. Dept. of Social Services, 18 S.W.3d 3, 7 (Mo. App. E.D. 2000).

In McQuay v. Arkansas State Board of Architects, 989 S.W.2d 499 (Ark. 1999), the Arkansas Supreme Court stated its rationale for requiring litigants to raise challenges to the constitutionality of a statute before the agency itself.

[W]e will not set aside an administrative determination upon a ground not presented to the agency because to do so would deprive the agency of the opportunity to consider the matter, make its ruling, and state the reasons for its actions. (Citations omitted.) The same applies to constitutional arguments not raised at the agency level. Id. at 344.

The Arkansas Court went on to state:

[E]ven though the Workers' Compensation Commission may not have authority to declare statutes unconstitutional, such constitutional issues should first be raised at the Administrative Law Judge or Commission level because such issues often require an exhaustive analysis that is best accomplished by an adversary proceeding, which can only be done at the hearing level. (Citation omitted.) Id. at 344. See also, Hamilton v. Jeffrey Stone Co., 641 S.W.2d 723 (1982).

The Supreme Court of Iowa likewise requires that constitutional issues be raised at the agency level to be preserved for judicial review. Soo Line Railroad Co. v. Iowa Dept. of Transportation, 521 N.W.2d 685, 687 (Iowa 1994); Fisher v. Board of Optometry Examiners, 478 N.W.2d 609, 612 (Iowa 1991); Office of Consumer Advocate v. Iowa State Commerce Comm'n, 465 N.W.2d 280, 283 (Iowa 1991). This is despite the fact that the

administrative agencies lack authority to decide constitutional questions. Id. 465 N.W.2d at 283.

The Georgia Supreme Court has also found that a constitutional challenge must be first raised in an agency proceeding. Georgia Real Estate Comm'n v. Burnette, 255 S.E.2d 38, (Ga. 1979). In Pence v. Georgia Board of Dentistry, 478 S.E.2d 437, 442 (Ga. App. 1996), the Georgia Court of Appeals stated:

The fact that one basis, or even the sole basis, of a respondent's complaint as to the hearing officer's initial decision is a constitutional attack, does not eliminate the necessity for agency review as a prerequisite to judicial review. (Citing Dept. of Public Safety v. Foreman, 202 S.E.2d 196 (Ga. App. 1973).)

As pointed out in the above cases, an aggrieved party must raise and preserve all of its issues before the agency, even if those issues involve the constitutionality of statutory provisions which may be beyond the authority of the agency to determine.

These cases also point out the distinction between subject matter jurisdiction and authority. Matters may be clearly within the subject matter jurisdiction of an agency even though the requested remedy may be beyond the agency's authority.

In Nebeker's prior appeal before the Commission, No. 95-1597, the Utah State Tax Commission had subject matter jurisdiction. Nebeker was required to raise all issues it had

with the assessment at that time. Even though the Tax Commission lacked authority to declare §59-13-501 unconstitutional, the Commission did have authority and ability to obviate or moot the question of interest by granting Nebeker relief from the tax assessment or by granting Nebeker relief from the interest on other grounds. Since the issue is one which could have been resolved by the Commission without reaching the constitutional question, it is clearly one which was required to have been raised before the agency.

The requirement to raise a constitutional issue before an agency is supported by sound policy reasons as stated in the cases cited above. Those policies apply with even greater force when the constitutionality of a taxing statute is called into question. "This Court has consistently upheld the Tax Commission's authority to carry out its responsibilities in furthering its constitutional and statutory mandate" [to administer and supervise the tax laws of the State]. Howell v. County Board of Equalization, 881 P.2d 880, 889 (Utah 1994). Because of the potentially disruptive affect that invalidating a state taxing statute may have on the operation of state government, the stated policy of the Court, that statutes are presumed to be constitutional³ and that constitutional issues

³ See, Hoyle v. Monson, 606 P.2d 240 (Utah 1980).

should be avoided where possible⁴, should apply with even greater force when it comes to constitutional challenges to tax statutes.

The Tax Commission as the agency given the constitutional duty to administer and supervise the tax laws of the State should be given an opportunity to rule on a matter where the ruling may moot or avoid constitutional questions. This rationale is also supported by the Court's recognition in Evans & Sutherland v. Utah State Tax Comm'n, 953 P.2d 435 (Utah 1997), that the courts may not encroach upon the Tax Commission's role carrying out its constitutional duties. Requiring the constitutional issue to be raised before the Commission promotes the efficient use of judicial resources and administration of justice. If the issue cannot be avoided or resolved at the Commission level, it may be appealed directly to the Supreme Court for resolution. The Court would then have the advantage of having the issue presented where the factual context has been fully established in an adversarial proceeding.

There is no question that had Petitioner taken a direct appeal from the ruling in case no. 95-1597 the Court would have not allowed it to raise the constitutional question. Whitaker v. Labor Comm'n, 973 P.2d 982 (Utah App. 1988). Nebeker should not be able to avoid this result by attempting to bring a second

⁴ Blue Cross & Blue Shield of Utah v. State, 779 P.2d 634, 637 (Utah 1979).

proceeding raising issues that were available to have been presented to the Commission in its original appeal.

IV. Judicial Estoppel Does Not Apply.

Attached as Exhibit "B" to the Tax Commission's Brief in Appeal No. 990835-SC, with which this appeal is consolidated, is the Memorandum of Points and Authorities in Support of the Tax Commission's Motion to Dismiss the District Court Complaint for Lack of Jurisdiction. After addressing Nebeker's stated basis for jurisdiction, the Commission addressed the stated basis for venue, Utah Code Ann. §63-46a-12.1, as a potential basis for jurisdiction. That section provides, "A person aggrieved by a rule may obtain judicial review of the rule by filing a complaint with the county clerk in the district court where the person resides or in the district court in Salt Lake county." The rule also requires that the person exhaust their administration remedies by filing an action with the Commission before filing the complaint unless filing the action with the Commission would cause the person "irreparable harm." Utah Code Ann. §63-46a-12.1(2)(a) and (2)(b)(iii)(1997).

The position the Tax Commission took at the prior proceeding was that Nebeker would suffer no "irreparable harm" if it were forced to bring a challenge to the rule before the Commission as required by that section. In the course of making that argument, the following statement was made at page 5 and 6 of the

Memorandum.

Although Petitioner alleges 'irreparable harm' in its petition, it does not state facts which would support any harm whatsoever. Petitioner alleges that the Commission failed to follow the provisions of the administrative rulemaking act in adopting the applicable interest rate. Even assuming, for purposes of argument, that Petitioner could prove its case in all respects, the only harm alleged or implied would be overpayment by Petitioner of interest on the assessment. There exists a statutory remedy for obtaining refunds of overpayments. A person in such a situation, if successful in proving their case before the Commission, could be made whole by the repayment of any overpayment with interest. Therefore, no harm would result, much less irreparable harm. Therefore, the irreparable harm exception to the exhaustion requirement of Utah Code Ann. §63-46a-12.1 does not provide Petitioner relief.

The Memorandum goes on to argue that even if irreparable harm had been shown, that Nebeker's claim, if brought under §63-46a-12.1, would be barred by the specific provisions of Utah Code Ann. §63-46a-14 which provides that such a contest must be brought within two years of the effective date of the rule.

The statement Petitioner apparently relies on in making its claim is the statement that "there exists a statutory remedy for obtaining refunds of overpayments." The next two sentences of the Memorandum qualify the prior statement and point out the purpose for which it was made. They read, "A person in such a situation, if successful in proving their case before the Commission could be made whole by the repayment of any overpayment with interest. Therefore no harm would result much

less irreparable harm.⁵" This statement acknowledges that a person making a claim for refund would have to successfully overcome any defenses which may exist to that claim, factual or legal. The purpose of this statement was to argue that, by definition, irreparable harm is not the type of harm which can be compensated in money damages. Black's Law Dictionary, 7th Edition, defines 'irreparable injury' as, "An injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction - Also termed, 'irreparable harm'." Therefore, the position taken in the prior litigation was that Nebeker had not made a showing of irreparable harm that would excuse it from the exhaustion requirement of Utah Code Ann. §63-46a-12.1, not because of the existence or nonexistence of a legal remedy, but because the harm claimed was for money damages and was therefore not "irreparable harm" by definition.

There has been no "change of position" taken in this litigation. The position was, and still is, that Nebeker would suffer no irreparable harm if required to bring any challenge it had to a Tax Commission rule before the Commission prior to proceeding in District Court.

The fact that the Commission raised a defense of *res*

⁵ See, Exhibit "B", Tax Commission Brief in Appeal No. 990835-SC, page 6.

judicata to Nebeker's claim for refund is not a change of position from what was argued to the District Court below. Page 6 of its Reply Memorandum attached as Exhibit "D" to the Tax Commission's Brief in Appeal No. 990835-SC the Commission states:

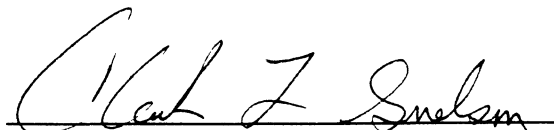
Petitioner fails to point out that it has had one full, fair and complete hearing before the Tax Commission. Petitioner's failure to raise this issue at that time, may well form the basis for a Motion to Dismiss should Petitioner find a jurisdictional basis to maintain an action.

The position taken in the prior matter, that Petitioner should have raised this issue in its prior hearing, is consistent with the defense of *res judicata* which formed the basis of the Tax Commission's ruling in this appeal.

CONCLUSION

The elements of *res judicata* were properly found by the Tax Commission. The constitutional claim which Petitioner attempts to raise separately in this action was a claim which was present at the time it contested its audit assessment. Since Nebeker failed to raise this issue in its prior appeal, the Tax Commission was correct in determining that the doctrine of *res judicata* would bar this action.

Respectfully submitted this 5th day of March, 2001.



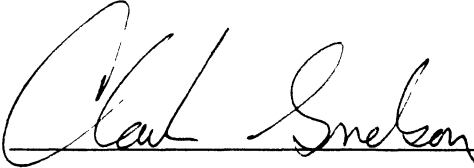
Clark L. Snelson
Assistant Attorney General
Attorney for Utah State Tax Commission

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of March,
2001, I caused two (2) true and correct copies of the foregoing
BRIEF OF APPELLEE to be mailed to postage prepaid, first class to
the following:

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